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No. 07-856

In The
Supreme Court of the United States

CARL R. PRUETT & SCOTT MARTIN,

Conditional Cross-Petitioners,

versus

HARRIS COUNTY BAIL BOND BOARD & HARRIS COUNTY,

Conditional Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review a statute such as Section 1704.109(b) that restricts truthful, non-misleading informational speech about public-record matters about the criminal justice system under the test in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), or apply strict scrutiny to the mixture of informational and commercial speech represented by a bail-bondsman's call or letter?

2. The Harris County Bail Bond Board's Petition cites *Florida State Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), where a 5-4 Majority upheld a 30-day restriction on personal-injury solicitation based on the Florida State Bar's two-year, 106-page report replete with surveys, studies, and statistics – the kind of report that the Texas Legislature never considered before restricting bondsman speech. The Texas Legislature did not conduct, commission, or consider *any* surveys, studies, testimony, polls, or reports before enacting Section 1704.109(b)'s restrictions on bail-bondsmen speech into statutory law. In justifying a restraint of speech, is a government restricted to offering only those interests that actually motivated that government to enact the speech restriction, or can it justify its restrictions *post hoc* with evidence it articulates once it is defending a statute's constitutionality in litigation?

3. Does Section 1704.109(b)'s ban on a bondsman's right to make 9:00 p.m. to 9:00 a.m. calls to the loved ones of incarcerated individuals violate the

QUESTIONS PRESENTED FOR REVIEW – Continued

right of the bail-bondsman's potential *customers* under the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution to *receive* truthful, accurate, non-misleading, and timely public-record information about bail-bonding services and prices?

4. Do the exacting standards this Court applied to personal injury attorneys in *Went for It* apply to this case and other cases involving the criminal-justice system, *e.g., Ficker v. Curran,* 119 F.3d 1150 (4th Cir. 1997) and *Babkes v. Satz,* 944 F.Supp. 909 (S.D. Fla. 1996), where a criminal defendant needs immediate representation and defense, rather than time to grieve; where there is no two-year statute of limitations but only an accelerated criminal-court calendar; where the arrestee is in the legal system involuntarily and has had his privacy compromised as a matter of public record before the first bondsman-call is made; and where the defendant enjoys a Sixth Amendment right to counsel the State cannot properly limit?

5. Do the standards applied to personal-injury attorneys in *Went for It* govern cases involving bail bondsmen under Section 1704.109(b), when the vast majority of bondsmen are not attorneys but business people and minimum wage workers?

6. In enacting Section 1704.109(b), did the Texas Legislature create an opt-in provision to enable citizens whose children, spouses, parents, or

QUESTIONS PRESENTED FOR REVIEW – Continued

other loved ones might be incarcerated to decide, in advance of any call from a bondsman, whether they would rather remain unaware that their loved one was incarcerated in the middle of the night rather than receive a bondsman's call notifying them of their ability to post a lawful bail bond between the hours of 9:00 p.m. and 9:00 a.m.?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Conditional Cross-Petition, the parties are:

Conditional Cross-Petitioners:

Carl R. Pruett and Scott Martin.

Conditional Cross-Respondents:

The Harris County Bail Bond Board and Harris County, Texas.

CORPORATE DISCLOSURE STATEMENT

Conditional Cross-Petitioners Carl R. Pruett and Scott Martin are individuals who do not fall within the scope of Supreme Court Rule 29.6's disclosure requirement.

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The Fifth Circuit's August 28, 2007 rehearing opinion is published at 499 F.3d 403 and the Southern District of Texas' May 20, 2005 Memorandum Opinion is published at 400 F.Supp.2d 967.

JURISDICTION

The Fifth Circuit's rehearing opinion was entered on August 28, 2007. This Court has federal question jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Conditional Cross-Petitioners Carl R. Pruett and Scott Martin (collectively, "Pruett") request this Court to issue a writ of *certiorari* to the Fifth Circuit regarding its reversal of the District Court's judgment invalidating Texas Occupations Code Section 1704.109(b)(2)(A)'s prohibition on late night and early morning calls as a violation of the First Amendment.

STATEMENT OF THE CASE

This First Amendment case challenges the constitutionality of a state statute, Texas Occupations Code Section 1704.109(b). But neither the Board's Petition nor the Fifth Circuit's Opinion discuss the circumstances that gave rise to this appeal – and

guide the Board's enforcement of the challenged statute. This statement fills in the gaps concerning Subsection 1704.109(b)(2)(A).

1. ***Cross-Petitioners Pruett and Martin pay Harris County's District Clerk to obtain access to public-record information about incarcerations and unserved warrants.*** Pruett and Martin own Justice Information Management System ("JIMS") permits issued by Harris County's District Clerk that permit them to use public-record information available over the Internet and through more than 5,700 JIMS terminals and 1,050 printers. R. 47 at 2695-2712, 2723 & 2766-77, R. 42 at 2211-2221. They purchase information about arrestee names, addresses, court settings, and unserved arrest warrants (48 hours after their issuance). R. 42 at 2211; R. 47 at 2695-2696. They call citizens (and send letters) if JIMS reveals that a citizen is in jail and that citizen's loved ones can lawfully post bond. R. 42 at 2212-21; R. 47 at 2696-97 & 2706-13. Calls and letters from these bondsmen inform citizens about arrests and incarcerations, *e.g.*, the sad but important news that someone's teenage son has been picked up for driving with a suspended license or someone's daughter has been jailed for passing a bad check. R. 42 at 2212-18; R. 47 at 2696-2713. A call from Pruett is often the first notice a citizen's loved one is in jail. Because of "Call Blocker" and Caller-ID systems that impede arrestee calls from pay-phones in jail, delays in booking, and broken phones in holding-cells, defendants often cannot tell their loved ones that they

have been jailed and need bail. R. 42 at 2213 ¶ 11; R. 47 at 2706-08; R. 47 at 2854-57; R. 47 at 2864-65 and 2872-82.

Pruett's calls enable citizens to minimize the dangers of assault, rape, and exposure to flu, tuberculosis, syphilis, HIV/AIDS, and other diseases in jail. R.42 at 2211; R. 47 at 2695-97. A short jail stay reduces the serious danger that a young, weak, or mentally ill arrestee will commit suicide while in jail. *Jutzi-Johnson v. United States*, 263 F.3d 753 (7th Cir. 2001), *rhg. denied*, 2001 U.S. App. LEXIS 25499 (7th Cir. Nov. 26, 2001) (citing Lindsay M. Hayes and Joseph R. Rowan, *National Study of Jail Suicides: Seven Years Later,* NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES (1988), which states that "12.9 percent of jail suicides occur within three hours of confinement, [and] 32.8 percent within the first 24 hours . . . "). By facilitating bail, bondsmen reduce jail-overcrowding. R. 42 at 2213 ¶ 11; R. 47 at 2706-08; R. 47 at 2854-57; R. 47 at 2864-65; 2872-82.

2. Pruett's competitor International Fidelity Insurance Company seeks to limit competition by restricting solicitation. This litigation originated in a rivalry between International Fidelity Insurance Company ("IFIC") agents, who invest heavily in large *Yellow Pages* advertisements to amass "existing business relationship" clients, and independent bondsmen who solicit business through targeted-mailings, phone calls, and smaller *Yellow Pages* ads. R. 44 at USCA5 2634-43 & 2650-51 (IFIC's lawsuit seeking to "investigate a potential claim

based on unfair business practices. . . ."); USCA5 at 2656 (IFIC Vice President Jerry Watson's deposition, at 57, stating that solicitation "damage[es] our industry and, ultimately, . . . our company in terms of its niche . . . "). IFIC's agents have been the largest provider of bail bonds in Harris County for more than a quarter century and underwrite twenty-six of eighty county bondsmen. R. 47 at USCA5 at 2760 and 2690 ¶ 17 and 2755; R. 44 at USCA5 2646.

IFIC officers pressured the Board to restrict Pruett's competition. R. 44 at USCA5 2573-77, 2646-47, 2659-2660; R. 49 at 3178-3179. In January of 2001, the Board briefly banned bondsman solicitation, then rescinded that ban in response to a Pruett lawsuit. IFIC's Secretary and General Counsel, Roger Moore, drafted rules restricting solicitation and submitted them to IFIC agent Clement Romeo, who presented them to the Board. USCA5 1655 and 2579-2606. But no one presented the Board with any studies, surveys, or statistics demonstrating a need for such rules. R. 36, USCA5 at 1615; R. 1, USCA5 at 488-95. On February 14, 2001, Assistant District Attorney Kathy Braddock, a Board member, urged adoption of IFIC's anti-solicitation rules, which the Board approved. *Id.*

During 2001, IFIC's General Counsel Roger Moore lobbied the 77th Legislature to enact anti-solicitation and other changes to the Bail Bond Act. USCA5 at 2609-2626. Although no one presented the Legislature with studies, surveys, or evidence showing a solicitation problem, IFIC lobbied the Legislature to

enact Senate Bill 1119, a bill Moore drafted, which became Section 1704.109(a), a law authorizing boards to regulate solicitation and advertising. R. 36 at USCA5 at 1616. IFIC agents soon complained that they were losing business because of Pruett's competition. *Id.*, USCA5 at 1616-18. In 2001, IFIC sued Pruett about "unfair competition" solicitation, but a Harris County judge dismissed the suit. *Id.*, USCA5 at 2642-53. IFIC's Vice President Jerry Watson then pressured the Board to enforce its anti-solicitation rules. USCA5 at 2659 and 2646-47.

3. On February 13, 2002, the Board suspended Pruett's license. On February 13, 2003, the Board suspended Pruett's license for calling about unserved warrants and outside specified times. USCA5 at 375-78 and USCA5 at 2662-65. That first-time enforcement of anti-solicitation rules resulted, on February 23, 2002, in Harris County District Judge Levi Benton's issuance of a T.R.O. restraining the Board from enforcing its license-suspension and rules. USCA5 at 2728-32, *Carl R. Pruett, et al. vs. Harris Cty. Bail Bond Board*, No. 2002-09290, in the 125th District Court of Harris County. After extensive hearings (in which IFIC intervened), USCA5 at 2528 and 2734-41, District Judge John Coselli permanently enjoined the Board from suspending Pruett's license in an August 29, 2002 judgment. USCA5 2743-47. The First Court of Appeals partly reversed and partly affirmed Judge Coselli's summary judgment two years *after* the Legislature enacted Section 1704.109(b), the statute Pruett challenges. The Texas

Supreme Court granted review and heard oral argument on December 6, 2006. *Harris Cty. Bail Bond Bd. v. Pruett,* 177 S.W.3d 260 (Tex. App. – Houston [1st Dist.] 2005, on rhg.), *pets. granted*, 05-0283, 2006 Tex. LEXIS 841 (Tex. Sept. 1, 2006).

4. The 78th Legislature enacted Texas Occupations Code Section 1704.109(b) in 2003, despite the absence of any pre-enactment testimony, surveys, or reports reflecting the Legislature's purpose or its careful balancing of the costs and benefits of restrictions on bondsman speech. In 2003, IFIC General Counsel Roger Moore testified in favor of House Bill 2729, a bill without solicitation restrictions. USCA5 at 2925-27. Witnesses testified in favor of House Bill 2729, but offered no testimony or other evidence about solicitation. USCA5 at 2930-53 (H.B. 2729, testimony at www.house.state.tx.us/fx/av/committee781-30401p09.ram, from 2:17:15-2:43:36). No witness presented the Legislature with any studies, surveys, reports, or testimony about solicitation. USCA5 at 1618-19 and USCA5 at 2936-54. IFIC lobbyists slipped an anti-solicitation provision its General Counsel Roger Moore drafted into the House Committee version of H.B. 2729. PRUETT RESPONSE App. 1, at App. 3, 15-18, USCA5 at 3022-23; PRUETT RESPONSE APP. 2, at App. 19-20, USCA5 451.

At the end of the 78th Session, IFIC lobbyists convinced a representative to place H.B. 2729's anti-solicitation amendment into Senate Bill 1336, a bill about bonding procedures that had not previously

addressed solicitation issues. R. 44 at 3038-50. There were no hearings about the amendment; no witness testimony; no reports; and no evidence. *Id.* and Pruett Cross-Appendix 1 at App. 5-18. The only "legislative history" for the amendment reads: "The bill also adds language regulating the solicitation of business for bail bond sureties . . . " USCA5 at 2999-3000 (emphasis supplied). Pruett Cross-Appendix 2 at App. 19-21. In its Cross-Motion for Summary Judgment, the Board acknowledged that, "[b]ecause there is no legislative history, Defendants do not have actual knowledge of the reasons that § 1704.109(b) was enacted." R. 35, at USCA5 1548.

5. Pruett and Martin filed suit to protect their licenses, livelihoods, and First Amendment rights. On July 11, 2003, David Schmidt of ABC Bonding Company, a former IFIC agent, began urging bondsmen to report violations of § 1704.109(b). R. 47 at USCA5 2714 and 2920-23; R. 1 at 459-65 at 465 (transcript pp. 22-23); *cf.* Pruett Cross-Appendix 5 at App. 27-29. Pruett sued the Board to enjoin enforcement of the statute and argued that, with no pre-enactment legislative record, the Board could not satisfy the test in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 531 (1980). R. 37, USCA5 1589-1651. The Board counterclaimed for a declaration that Section 1704.109(b) was enforceable and sought attorney's fees. R. 35 (Board MSJ). After the First Court of Appeals partially reversed Judge Coselli's summary judgment in the parallel state court appeal, Board member Glen

Stricklin sent e-mails to bondsmen notifying them that the Sheriff would enforce the anti-solicitation policy. R. 62. *See also* R. 63 and 66.

After extensive discovery, District Judge Ken Hoyt entered a summary judgment in favor of the bail-bondsmen, rejected the Board's proffer of *post hoc* evidence, and permanently enjoined enforcement of the anti-solicitation restrictions. *Pruett v. Harris Cty. Bail Bond Bd.*, 400 F.Supp.2d 967, 976 (S.D. Tex. 2005); BOARD APPENDIX 2. He also ruled, in the alternative, that the Board had not borne its *Central Hudson* burden of proving constitutionality.

THE FIFTH CIRCUIT'S DECISION

The Fifth Circuit partially affirmed and partially reversed after approving the use of *post hoc* evidence never shown to have been considered by any Texas legislator:

> *Central Hudson* does not require that evidence used to satisfy its strictures exist pre-enactment. Plaintiffs rely heavily on the statements in *Edenfield v. Fane* [507 U.S. 761 (1993)] that a statute cannot be justified "by mere speculation or conjecture" and that "[t]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." Those statements, however, only distinguish between rational

> basis review, under which a court can, and should if necessary, confect its own reasons to justify a statute, and *Central Hudson* review, under which a court can consider only the reasons proffered by the state. . . . We consider the testimony and affidavits introduced by Harris County in the court below, as the district court did in the alternative.

Rehearing Opinion, BOARD APPENDIX 1 at App. 8-9, citing *Moore v. Morales*, 63 F.3d 358, 362-63 (5th Cir. 1995), *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299 (5th Cir. 2007), and *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998). The Fifth Circuit also acknowledged a circuit split and referred to other circuits' cases holding that post-enactment evidence cannot support a speech restriction. BOARD APPENDIX 1 at App. 10, fn. 11.

Without referring to any pre- or post-enactment evidence or precedent, the Fifth Circuit reversed the ruling that Section 1704.109(b)(2)(A)'s prohibition of late night calling was unconstitutional:

> [W]e conclude that (b)(2)(A) survives *Central Hudson* scrutiny. Prohibiting in-person and telephone solicitation at late hours directly and substantially furthers privacy and the prevention of harassing solicitation, and is narrowly tailored to furthering that goal. A nighttime prohibition is inevitably underinclusive because privacy may be lost and harassing solicitation made during the day, but surely the state's interest is more powerful at

> night. Indeed, we've found no successful challenges to general nighttime solicitation bans.

Rehearing Opinion, BOARD APPENDIX 1, at App. 21. The Fifth Circuit failed to consider several charitable solicitation cases holding that night time solicitation bans are unconstitutional. *Pennsylvania Public Interest Coalition v. York Township,* 569 F.Supp. 1398, 1403 (M.D. Pa. 1983); *Connecticut Citizens Action Group v. Town of Southington,* 508 F.Supp. 43, 45 (D. Conn. 1980).

REASONS FOR GRANTING THIS CONDITIONAL CROSS-PETITION

This Court should grant this petition for three compelling reasons. First, this is an appropriate case to decide whether this Court should continue applying the *Central Hudson* standard to cases involving truthful, non-misleading, informational "commercial speech" about matters of public importance or substitute a strict scrutiny test in its place.

Second, this case presents circuit splits that transcend the commercial speech doctrine: issues of whether a court should rely only upon pre-enactment evidence of a governmental purpose for restricting speech, or whether, instead, a government can show a "careful balancing" of interests and justify its restrictions *post hoc* using any "common sense" rationale lawyers can articulate.

Third, this appeal offers an issue of first impression: whether this Court's 5-4 decision in *Florida State Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), which upheld a 30-day restriction on personal-injury solicitation, applies to cases involving the criminal justice system, such as *Ficker v. Curran,* 119 F.3d 1150 (4th Cir. 1997) and *Babkes v. Satz,* 944 F.Supp. 909 (S.D. Fla. 1996), where an accused defendant needs immediate representation and defense, rather than a prolonged time to grieve; where there is no two- or four-year personal injury statute of limitations, but, instead, an accelerated criminal-court calendar; where the arrestee's privacy is already compromised as a matter of public record before the first bondsman-call is made, as opposed to the personal injury victim who can choose to avoid public scrutiny by not filing suit or by settling quietly; and where the arrestee enjoys a Sixth Amendment right to counsel that the State cannot lightly deny. *See* TEX. ATT'Y GEN. OP. NO. JC-0022 (March 12, 1999) (distinguishing between criminal-defense solicitation and personal injury solicitation).

I. Courts deciding First Amendment challenges to restrictions on commercial speech apply the increasingly outdated 4-part *Central Hudson* framework – and reach increasingly irreconcilable conclusions about the First Amendment.

Conditional Cross-Petitioners Pruett and Martin ask this Court to end the contrived distinctions

between commercial speech and political, protest, literary, artistic, charitable, and religious speech. There are many sound reasons for erasing a distinction outside the text of the First Amendment. *See, e.g.*, Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence,* CATO POLICY ANALYSIS NO. 161 (Sept. 23, 1991), at http://www.cato.org/cgi-bin/scripts/printtech.cgi/pubs/pas/pa-161.html; Robert A. Levy, *Like It or Not, Free Speech Protects Telemarketers, Too,* http:/www.cato.org/pub_display.php?pub_id=3275 (Oct. 23, 2003).

Under *Thompson v. Western States Medical Center,* 535 U.S. 357 (2002) and *Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173 (1999), commercial speech includes advertising and solicitation. It is reviewed under an intermediate scrutiny test that contrasts with the strict scrutiny applied to restrictions on the sale of books, magazines, newspapers, art, music, and films. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence,* 2007 U. ILL. L. REV. 783, 793 (2007).

A free press and commercial solicitation have been inextricably linked since colonial times; that the modern distinction between fully protected speech and "commercial speech" did not occur to early Americans. *See* Verner W. Crane, INTRODUCTION TO BENJAMIN FRANKLIN'S LETTERS TO THE PRESS, 1758-1775, at xi, xvi (Verner W. Crane ed., 1950); Kent R. Middleton, *Commercial Speech in the Eighteenth*

Century, in NEWSLETTERS TO NEWSPAPERS: EIGHTEENTH-CENTURY JOURNALISM 277, 282 (Donovan H. Bond & W. Reynolds McLeod eds., 1977). The first issue of the first American newspaper contained information-laden commercial speech similar to Cross-Petitioner Martin's brochures in this case: "This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost, may have the same inserted at a Reasonable Rate." *Boston Newsletter* (April 24, 1704), in J. P. Wood, THE STORY OF ADVERTISING (1958), pp. 45-46.

Printer-historian Isaiah Thomas, editor of a Revolutionary War paper, wrote that, "[A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention . . . " *See History of Printing in America with a Biography of Printers, and an Account of newspapers* (1810), quoted in Daniel Boorstin, THE AMERICANS: THE COLONIAL EXPERIENCE 328 (1958). Ben Franklin rose to prominence by defending freedom to advertise in *Apology for Printers* on June 10, 1731. *Id.*, *reprinted in* 2 WRITINGS OF BENJAMIN FRANKLIN 176 (Albert Henry Smith ed., 1907). *See* S. Botein, *Printers and the American Revolution*, in THE PRESS AND THE AMERICAN REVOLUTION 20 (B. Bailyn & J.B. Hench eds., 1980). When Britain's Parliament assessed a Stamp Act tax on each newspaper and ad in 1765, it galvanized the

American people against the British government. Arthur Schlesinger, PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN 1764-1776, 68 (Northeastern University Press, 1966/1997 reprint ed.).

Early American legislators neither distinguished between commercial and noncommercial speech nor restricted truthful commercial messages about lawful products and services. *See, e.g.*, Public Statute Laws of the State of Connecticut (1808) and Laws of Maryland (1811). Equating liberty and property, the Framers viewed political and commercial speech as inalienable aspects of liberty. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment,* 63 U. CHI. L. REV. 49, 58 (1996), citing John Locke, SECOND TREATISE ON GOVERNMENT at 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg. 1975). James Madison, drafter of the First Amendment, wrote that, "[A] man has a property *in his opinions and the free communication of them*." *See* Madison, "Property," *The National Gazette*, Mar. 27, 1792, in 14 PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland & Thomas Mason eds., 1983) (emphasis in original).

In *Valentine v. Chrestenson,* 316 U.S. 52 (1942), a New Deal Court refused to extend any First Amendment protection to commercial speech. *See also* D. Yassky, *Eras of the First Amendment,* 91 COLUM. L. REV. 1699 (1991). As Professor Ronald A. Smolla observed, "[t]hat segment of American culture that lives for a life of the mind, and indeed makes a living from a life of the mind, will naturally harbor some

disdain for the coarser entries in the marketplace of ideas – those ideas that only sell goods or services." Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 780, 783 (1993).

A court more attuned to the marketplace ended the *Valentine* era in the Bicentennial Year, when this Court acknowledged that the First Amendment's protection extends to commercial/informational speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 783 (1976), this Court held that commercial speech enjoys First Amendment protection and that "freedom of speech 'necessarily protects the right to receive.' . . . If there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 756-57.

In 1980, this Court articulated a test for determining whether a restriction of commercial speech passes constitutional muster in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Under *Central Hudson*, a court asks, first, if the conduct the speech proposes is lawful; second, if the harms the government recites are real; third, if the restriction will directly and materially address those harms, and fourth, if the restriction is narrowly tailored. In *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court held that "[t]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions . . . " *Id.* at 768. "This burden is not satisfied by mere speculation

or conjecture." *Id.* at 771. Under *Central Hudson,* a governmental entity must demonstrate a "careful calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999). *See also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

This Court has grown skeptical of paternalism in commercial speech cases. In *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996), this Court held that "bans against truthful, non-misleading commercial speech . . . usually rest solely on the offensive assumption that the public will react 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Id.* at 503. And in *Thompson v. Western States Medical Center,* this Court explained that, "[w]e have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Id.*, 535 U.S. at 374.

The Fifth Circuit's ruling about Section 1704.109(b)(2)(A) conflicts with the reasoning in *44 Liquormart* and *Thompson*. Here, the Fifth Circuit substituted its conjecture about the Legislature's purpose for a missing legislative record. The Fifth Circuit did so to keep citizens in the dark, for their own good (a little more sleep).

Pruett endorses the ruling in *Federal Election Comm'n v. Wisconsin Right to Life*, ___ U.S. ___, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (U.S. June 25, 2007), where this Court held that, "[t]he freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . [Courts] must give the benefit of any doubt to protecting rather than stifling speech." *Id.*, 127 S. Ct. at 2666. Pruett's late night calls about late night arrests are timely and can avoid jailhouse tragedies, *i.e.*, assault, rape and AIDS. Pruett's speech concerns matters of public concern, so he should have the right to speak without fear of losing his bail-bonding license.

The Board does not deny that Pruett's, Martin's, and their employees' speech is truthful, non-misleading, and useful to anyone unfortunate enough to discover that a child, spouse, parent, or other loved one has been jailed. The Legislature, acting at IFIC's behest, silenced the independent-bondsman who competes with IFIC agents. The messages censored concern a citizen's constitutionally-protected right to post bond.

A statute restricting this important category of speech merits strict scrutiny, or, at a minimum, a near-strict-scrutiny standard. Truthful, non-misleading commercial speech has a powerful informational component. In *44 Liquormart*. Justice Stevens, writing for a four-Justice plurality, held that a blanket prohibition against truthful, non-misleading speech

about a lawful product should be subjected to a heightened analysis akin to strict scrutiny. In such a case, a court must act with "special care, mindful that speech prohibitions of this type rarely survive constitutional review." *44 Liquormart,* 517 U.S. at 504 (Stevens, J., plurality) and 518 (Thomas, J., concurring) (citing *Central Hudson*, 447 U.S. at 566 n.9). Although only four Justices subscribed to Justice Stevens' plurality, Justice Thomas's concurrence stated that he would abandon *Central Hudson* and apply strict scrutiny to "commercial" speech. *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1234 n.5 and 1235 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). Pruett asks this Court to extend *44 Liquormart's* logic to his truthful, non-misleading informational speech about the criminal justice system.

In *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004), the Third Circuit set aside the government-oriented approach of *Pitt News v. Fisher*, 215 F.3d 354 (3d Cir. 2000), *cert. denied*, 531 U.S. 812 (2001), and subjected restrictions on truthful commercial speech to a near-strict-scrutiny analysis because "[t]he very purpose of Section 4-498 is to discourage a form of speech (alcoholic beverage ads) that the Commonwealth regards as harmful . . . " *Pappert*, 379 F.3d at 106.

Strict-scrutiny, its *44 Liquormart* equivalent, or an elevated *Pappert* standard should govern this case. The Board has not tried to justify the statute as necessary to prevent fraud or misrepresentation. This case concerns truthful, non-misleading speech, where

restrictions "rarely survive constitutional review." *44 Liquormart* at 504 (Stevens, J., plurality) and 518 (Thomas, J., concurring). R. 49.

Alternatively, this Court should clarify that its rulings about lawyers' personal injury solicitation in *Florida Bar v. Went for It*, 515 U.S. 618 (1995) do not apply to bondsmen conveying a truthful, non-misleading message about bail-bonding services. In *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), the Fourth Circuit struck down a restriction on solicitation of criminal-defense work. The *Ficker* court did not rely on *Went for It*, whose 5-4 majority upheld a 30-day ban based on "special vulnerability and private grief," because it did not apply to criminal cases:

> Both the First Amendment interests and the government interests in this case differ markedly from those in *Florida Bar* . . . First, the Court in *Florida Bar* rested its conclusion largely on the principle that the privacy of accident victims and wrongful death victims deserves protection in order to provide them with a period to cope with their grief before being asked to redress an emotional loss. . . . The case before us lacks a similar justification.
>
> While a criminal or traffic defendant may be shaken by his arrest, what he needs is representation, not time to grieve. Second, while accident victims typically have three years in which to file a claim, criminal defendants are subject to a much more accelerated calendar . . . The relative urgency of the

> defendant's need for legal representation finds no parallel in the civil plaintiff. Third, a criminal defendant's privacy concerns differ considerably from those of a potential civil plaintiff. Unlike an accident victim, who can choose to avoid public scrutiny of his private affairs by not filing a suit or by settling quietly, the criminal arrestee is in the legal system involuntarily and has already had his privacy compromised before a solicitation letter is ever sent. Fourth, unlike a civil litigant, the criminal or incarcerable traffic defendant enjoys a Sixth Amendment right to counsel . . . when the state is prosecuting a defendant, it cannot lightly deprive its opponent of critical information which might assist the exercise of even a qualified right . . .

Ficker, 119 F.3d at 1155-56. *See also Babkes v. Satz*, 944 F.Supp. 909 (S.D. Fla. 1996).

Similarly, Section 1704.109(b)(2)(A) precludes calls that can release presumably innocent citizens from jail quickly. During a night-time stay in jail, a citizen can face anything from boredom to a beating to rape to murder. It is not the bondsman who intrudes into a family's privacy, but the State, when it makes that arrest a matter of public record. Having placed an individual in jail, the State should not preclude family members from learning, as quickly as possible, that a son, daughter, spouse, or parent is in jail and is entitled to be released on bond. Application of a heightened standard of review applicable to

inextricably interwoven commercial and informational speech would result in a reversal of the Fifth Circuit's ruling about late night calls. *See Riley v. National Federation of the Blind for North Carolina*, 487 U.S. 781, 796 (1988).

II. The Fifth Circuit erred in holding that Section 1704.109(b)(2)(A)'s late night calling-prohibition survives *Central Hudson* scrutiny.

A. Pruett has standing to assert his and his prospective customers' First Amendment right to receive truthful, non-misleading information about bail-bonding services at a time when that information could enable a citizen to avoid the serious dangers associated with an overnight stay in a county jail cell.

The Fifth Circuit erred in reversing the District Court's invalidation of the 9 p.m. to 9 a.m. calling prohibition because it ignored the right of Pruett's potential customers to receive his truthful, non-misleading message. The Fifth Circuit's decision conflicts with this Court's recognition, in *Virginia State Board*, that "freedom of speech 'necessarily protects the right to receive' . . . " 425 U.S. at 756-57.

Pruett has a vendor's *ius tertii* standing to raise his prospective customers' First Amendment right to hear his truthful, non-misleading speech about the constitutionally-protected right to post bond for a

loved one arrested after 9 p.m. *See Craig v. Boren*, 429 U.S. 190, 194-95 (1976) ("As a vendor with standing to challenge the lawfulness of §§ 241 and 245, appellant Whitener is entitled to assert the concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force."); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965); *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989). Pruett's JIMS Subscriber-Access contract and monthly JIMS payments also give him standing to complain about the denial of his right to call. R. 47 (Pruett Affidavit) at 2692-96 ¶¶ 21-31; R. 49 (MSJ Response) at 3184. Finally, Pruett is a father of teenagers. R. 49 at 3184. Like other fathers of teenagers, he has to worry whether a child might be incarcerated. Pruett would rather receive a bondsman's timely call – even a phone call in the wee hours – so he could secure that child's immediate release from jail. *Id.* Like Pruett, many a father or mother whose child does not return home by curfew would rather receive a bondsman's call than spend the night worrying whether that child is in a morgue. Unfortunately, the Fifth Circuit ignored this issue.

B. Pruett's late night calls, which propose the posting of a bail bond, do not constitute an "unlawful transaction" under *Central Hudson*.

In the district court and on appeal, the Board contended that Section 1704.109(b)(2)(A) survived

Central Hudson scrutiny because it regulated conduct unlawful under a statute banning late night telemarketing, Texas Business and Commerce Code Section 37.02(a)(2). The district court rejected that argument. BOARD APPENDIX 2 at App. 48; R. 49 at 3172-74. The Fifth Circuit did not reverse that ruling. *See* BOARD APPENDIX 1 at App. 21 ("We don't decide that question . . . ").

On page 5 of its Petition, the Board refers to the Texas First Court of Appeals' decision, which held, *inter alia*, that late night calls violated the telemarketing statute in *Harris County Bail Bond Board v. Pruett,* 177 S.W.3d 260, 275-76 (Tex. App. – Houston [1st Dist.] 2005, cross-petitions pending). The Texas Supreme Court granted review on September 1, 2006 and heard oral argument on December 6, 2006. Both the federal district court and the Fifth Circuit rejected First Court of Appeals Chief Justice Sherry Radack's analysis, so there is ample reason to believe that the Texas Supreme Court will reverse the decision.

First, the Texas telemarketing statute concerns solicitation of "consumer goods or services" relating to real estate, cemetery lots, timeshares, and the like. Pruett Cross-Appendix 6 at App. 31-32. Bail-bonds are not consumer goods or services like cemetery lots and timeshares; they are unique, three-way contracts among the State, a defendant, and a bondsman. "A 'bail bond' is a written promise by the defendant and his sureties to the State that the defendant will appear before a court or magistrate to answer a criminal accusation, secured by an amount of money

set by a judge, a magistrate, or under some circumstances a peace officer." TEX. ATT'Y GEN. OP. NO. GA-0484 (Nov. 21, 2006), at 2. If a defendant fails to appear, the bond is payable to the State, not the bondsman, under Texas Code of Criminal Procedure article 17.08. *Reyes v. Texas*, 31 S.W.3d 343, 345-46 (Tex. App. – Corpus Christi 2000, no pet.). The Code of Criminal Procedure and Sections 11, 11A, and 13 of Texas' Constitution govern bail-bonding. Those laws do not preclude phone calls shortly after a late night or early morning incarceration. R. 49 at 3172-73.

Second, the First Court of Appeals assumed that the Legislature acted irrationally by outlawing activity that was, according to that court, already illegal. If late night calls were *already* illegal in 2000-2002, the 78th Legislature had no reason to outlaw them again in 2003. The Legislature is presumed to act rationally and to craft statutes with care. *Mellinger v. Houston*, 68 Tex. 37, 3 S.W. 249 (1887). R. 49 at 3173. The Legislature enacted Section 1704.109(b) to ban calls that had been *lawful*.

Third, modern telemarketing statutes, such as the national Do Not Call Registry statute, ban "only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls . . . " *Mainstream Marketing, Inc. v. F.C.C.*, 358 F.3d 1228, 1242 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004). As the Tenth Circuit noted in *Mainstream Marketing*, this Court "has repeatedly held that speech restrictions based on private choice (*i.e.* – an opt-in feature) are less

restrictive than laws that prohibit speech directly." *Mainstream*, 358 F.3d at 1242 (citing this Court's cases). In contrast, the Legislature prohibited speech as a first resort, without creating an opt-in system, so Section 1704.109(b)(2)(A) lies far outside the mainstream of this Court's decisions.

Fourth, Pruett still satisfied *Central Hudson's* threshold "lawful activities." In *44 Liquormart,* this Court held that, "The First Amendment does not protect commercial speech about unlawful *activities*." 517 U.S. at 497 n.7 (emphasis supplied). The "proper inquiry is not whether the speech violates a law or regulation, but rather whether the *conduct* that the speech promotes violates the law." *See also Washington Legal Fndn. v. Friedman*, 13 F.Supp.2d 51, 66 (D. D.C. 1998), *vacated by Washington Legal Fndn. v. Henney*, 340 U.S. App. D.C. 108, 202 F.3d 331 (D.C. Cir. 2000) ("It is clear that when the Supreme Court declares that the First Amendment does not protect illegal activity, it is referring to the *conduct* that the speech is promoting (*e.g.*, prostitution, counterfeiting, narcotic use, and the like), and *not the speech subject to the restriction*."). Pruett does nothing illegal when he helps a citizen post a bail bond.

C. Neither "common sense" nor consensus nor a long history supports the Fifth Circuit's holding that Section 1704.109(b)(2)(A)'s late night calling ban comports with the First Amendment – a ruling that exemplifies the growing circuit-split about a government's *Central Hudson* burden of assembling an adequate record sufficient to prove the existence of a substantial governmental purpose and the careful, pre-enactment balancing of interests necessary for narrow tailoring.

1. A government bears the burden of assembling an adequate legislative record in response to a First Amendment challenge.

The Fifth Circuit erred by reversing the District Court's decision, thus excusing the Board's failure to bear its *Central Hudson* burden of proving, through pre-enactment evidence, a substantial governmental purpose. Alternatively, the Fifth Circuit improperly relied on *post hoc* developed-in-litigation rationales the Texas Legislature never considered. In the absence of pre-enactment evidence, the Fifth Circuit speculated about the Legislature's fulfillment of its "narrow tailoring" obligation, which requires proof that a government "has carefully calculated the costs and benefits of regulation." *Cincinnati v. Discovery Network,* 507 U.S. 410, 417-18 (1993).

"When plaintiffs challenge a content-based speech restriction," this Court has ruled, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997); *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). In commercial speech cases, the government bears the burden of assembling a record to defend its restrictions. "When faced with a constitutional challenge, the government bears the responsibility of building a record adequate to clearly articulate and justify the state interest . . . " *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1234-35 (10th Cir. 1999), *cert. denied sub nom. Competition Policy Inst. v. U.S. West, Inc.*, 530 U.S. 1213 (2000). *Cf. Peek-a-Boo Lounge of Bradentown, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1265-67 (11th Cir. 2003, *rhg. en banc denied*), *cert. denied*, 541 U.S. 988 (2004). Here, no such record exists, so the Fifth Circuit erred in ruling as if the Board had borne its burden of proof, when the Board had not.

2. The circuits and state supreme courts are divided about whether a government can justify a speech restriction with post-enactment evidence.

The most important reason courts decline to accept *post hoc* justifications for commercial speech restrictions is because such post-enactment evidence

disregards this Court's requirement, in *Edenfield v. Fane*, 507 U.S. 761 (1993), that, "[t]he *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions . . . " *Id.* at 768, citing *Central Hudson*. If "[t]his burden is not satisfied by mere speculation or conjecture," as the *Edenfield* court ruled, *id.* at 771, then *post hoc* justifications can never take the place of contemporaneous statements of legislative intent. "Legislative history generated in the course of litigation . . . may be designed to mislead . . . [to] put an advocate's slant on things." *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438-39 (7th Cir. 1988).

If a government needs to restrict commercial speech, it should state the reasons it is doing so at the time it enacts a bill. When the Third Circuit observed that governments "do not hold hearings and compile legislative records before acting on proposed legislative measures" in *Phillips v. Borough of Keyport*, 107 F.3d 172 (3d Cir. 1997) (*en banc*), it ignored several things. First, freedom of speech is an inalienable right under the First Amendment. Second, the First Amendment does not make fine distinctions between categories of speech. Finally, legislators can always compile a legislative record when there is a need to restrict speech. In *Florida State Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), a 5-4 Majority upheld a 30-day restriction on personal injury solicitation because the Florida Bar had prepared a two-year, 106-page report replete with surveys, studies, and statistics.

A large majority of the nation's circuit courts require proof that the government relied on pre-enactment evidence, *e.g.*, statements of the government's purpose(s) in restricting specified speech. The decision whether to limit review to pre-enactment evidence clearly considered by the government *before* enacting the restriction will often determine whether a court enforces or invalidates a restriction on speech. In *Tinsley Media, LLC v. Pickens Cty., Ga.*, No. 05-12324, 2006 U.S. App. LEXIS 25467 (11th Cir. Oct. 12, 2006), *rhg. en banc denied*, 2006 U.S. App. LEXIS 32579 (11th Cir. Dec. 5, 2006) (unpublished), a commercial speech case about billboard advertising, the Eleventh Circuit ruled that a county could not prove the existence of a "substantial governmental interest" under the second prong of *Central Hudson, Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), because that county's speech restriction contained no at-enactment statement of the government's purpose. "The County acknowledges that the 1999 Ordinance contains no stated purpose or findings to support the restrictions," the *Tinsley* panel observed, "but argues that the affidavit of the county commissioner – submitted during litigation, five years after the enactment of the ordinance – is sufficient to establish the purpose of the ordinance." *Tinsley* at *12.

The billboard company objected to the affidavit as inadmissible legislative history and argued that, even if it was admissible, *post hoc*, litigation-generated rationales are "insufficient to overcome the failure of the ordinance to state its purpose." *Tinsley*, at *12. "The County acknowledges that the 1999 Ordinance contains no stated purpose or findings to support the restrictions, but argues that the affidavit of the county commissioner – submitted during litigation, five years after the enactment of the ordinance – is sufficient to establish the purpose of the ordinance." *Id.* A *post hoc* affidavit was inadmissible because "the vast majority of courts reject the use of *post hoc* testimony as a means of establishing legislative intent." *Tinsley*, at *12-13, citing *Covalt*, 860 F.2d at 1438-39 and *Bread Political Action Commission v. Federal Election Commission*, 455 U.S. 577, 582 n.3 (1982).

The *Tinsley* court also ruled that, "even if the affidavit were admissible, it is insufficient under our precedents to satisfy the burden of the County to prove a substantial governmental interest." *Tinsley*, at *12-13, citing *Dills v. City of Marietta*, 674 F.2d 1377, 1381 (11th Cir. 1982). "Without a statement of purpose in the ordinance," the *Tinsley Media* panel of the Eleventh Circuit ruled, "the statute cannot satisfy the 'substantial governmental interest' requirement of *Central Hudson* . . . " *Tinsley*, at *14. The Fifth Circuit's willingness to speculate about the unstated governmental purpose behind Section 1704.109(b)(2)(A) stands in stark contrast to the majority of circuit

courts exemplified by *Tinsley Media*. *See also Peek-a-Boo Lounge of Bradentown, Inc. v. Manatee Cty.*, 337 F.3d 1251, 1265-67 (11th Cir. 2003, *rhg. en banc denied*), *cert. denied*, 541 U.S. 988 (2004); *D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 57-58 (1st Cir. 1999); *Hickerson v. City of New York*, 146 F.3d 99, 105 (2d Cir. 1998); *11126 Baltimore Blvd. v. Prince George's Cty., Md.*, 886 F.2d 1415, 1423 (4th Cir. 1989); *SOB, Inc. v. Cty. of Benton*, 317 F.3d 856, 862 (8th Cir. 2003). Recently, in *White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163 (2d Cir. 2007), the Second Circuit rejected the City of Hartford's argument that it could justify a restriction on a sexually-oriented business with "any evidence" of secondary effects, "regardless of whether they reviewed such evidence before or after enacting the Ordinance." *Id.* at 171-73. The Second Circuit concluded that this Court's standard in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) "suggests that pre-enactment evidence is necessary." *Id.*

The Third and Fifth Circuits have reached contrary conclusions, principally in cases involving topless dancing. Those courts permit governments to justify restrictions with *post hoc* evidence. In *Phillips v. Borough of Keyport*, 107 F.3d 172 (3rd Cir. 1997) (*en banc*), the Third Circuit reasoned that,

> Whatever level of scrutiny we have applied in a given case, we have always found it

> acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach . . .

Id. at 178. *See also J&B Entertainment*, 152 F.3d at 371; *Ben Rich Trading, Inc. v. City of Vineland,* 126 F.3d 155, 161 (3d Cir. 1997).

This Court has long cautioned about the dangers of relying on post-enactment, created-for-litigation justifications for statutes. Except for rational relationship cases, this Court has long since rejected the notion that a party could confect a legislative history for a statute after the Legislature had adjourned, stating that, "*post hoc* observations by a single member of Congress carry little if any weight." *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 582 n.3 (1982).

In *Baylor University Medical Center v. Heckler*, 758 F.2d 1052 (5th Cir. 1985), the Fifth Circuit discussed the impropriety of *post hoc* justifications:

> Broadly speaking, agencies cannot bolster ostensibly invalid regulatory action with after-the-fact explanations as to the regulation's validity. "An agency's action must be upheld, if at all, on the basis articulated by the agency at the time of the rule making." *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) . . . The disallowance of *post hoc* rationalization of agency action is shorthand for the principle that the substantive validity of regulatory action may be buttressed only by the reasons proffered at the time the action is taken. *See Global Van Lines, Inc. v. I.C.C.*, 714 F.2d 1290, 1299 n.8 (5th Cir. 1983).

Baylor, 758 F.2d at 1060. State courts express similar skepticism. In *In re Doe*, 19 S.W.3d 346 (Tex. 2000), the Texas Supreme Court held that,

> Courts construing statutory language should give little weight to post-enactment statements by legislators. Explanations produced, after the fact, by individual legislators, are not statutory history, and provide little guidance as to what the legislature collectively intended.

Id., at 352. By relying on *post hoc* evidence here, the Fifth Circuit ignored its own precedent.

D. In the absence of *any* contemporaneous legislative record or pre-enactment evidence of a proper governmental purpose, careful balancing, or narrow tailoring, the Fifth Circuit erred in reversing the District Court's ruling that Section 1704.109(b)(2)(A) violated the First Amendment.

The Fifth Circuit reversed the District Court's ruling that Section 1704.109(b)(2)(A) was unconstitutional on the basis of the Legislature's unstated intent. That creates a circuit conflict with the Tenth Circuit's *U.S. West* decision, the Eleventh Circuit's *Tinsley Media* and *Peek-a-Boo Lounge* rulings, and the Sixth Circuit's 2007 decision in *Pagan v. Fruchey,* 492 F.3d 766 (6th Cir. 2007), *pets. denied,* No. 07-420 (U.S. Dec. 3, 2007), where the Village of Glendale defended a traffic ordinance that banned advertising on automobiles with a conclusory affidavit rather than studies, statistics, or examples of individuals injured while looking at "For Sale" signs on cars. *Id.* at 772-773. Citing *Board of Trustees of the State University of New York v. Fox,* 492 U.S. 469, 480 (1989), the Sixth Circuit emphasized the government's burden of proof:

> [I]t is important to note that, contrary to the district court's conclusion, the regulatory authority bears the burden of establishing a reasonable fit when regulating commercial speech. In the commercial speech context at least, our review will, to some extent, require

> examination of the means chosen by the government. The obligation rests with the government to establish that its regulation is "narrowly tailored" and that it has carefully calculated the costs and benefits of regulation. *See* [*Cincinnati v.*] *Discovery Network,* 507 U.S. [410] at 417-18 [(1993)]; *see also Fox,* 492 U.S. at 480.

Pagan, 492 F.3d at 778. Here, the Board bore the burden of proving that it satisfied *Central Hudson's* "narrow tailoring" requirement by "carefully calculat[ing] the costs and benefits of regulation." The Board did not do so. As the Board admitted in footnote 2, on page 12 of its Appellant's Brief, "[t]he lack of legislative history precludes actual knowledge of the reasons that Section 1704.109 was enacted."

In *Pagan,* the Sixth Circuit relied on this Court's commercial speech decisions in *Edenfield v. Fane* and *Thompson v. Western States Medical Center* to reject the argument that subjective notions of "common sense" can justify restrictions in the absence of real proof of concrete, non-speculative harm:

> Instead of actual evidence of harm, appellees ask us to adopt a standard of "obviousness" or "common sense," under which we uphold a speech regulation in the absence of evidence of concrete harm so long as common sense clearly indicates that a particular speech regulation will directly advance the government's asserted interest. The difficulty with this proposition, however, is that the standard established by the Supreme Court

> depends neither on obviousness nor common sense. *Edenfield* requires *some* evidence to establish that a speech regulation addresses actual harms with some basis in fact.

Pagan, 492 F.3d at 774. The Sixth Circuit analyzed that "common sense" argument as one lacking proof of longstanding consensus or agreement:

> In applying *Edenfield*, the Supreme Court has observed that there are situations in First Amendment contexts other than commercial speech where the articulated harm is so obvious that no evidence is required: "[I]n other *First Amendment* contexts, we have permitted litigants to justify speech restrictions . . . based solely on history, consensus, and simple common sense." *Fla. Bar,* 515 U.S. at 628 (citing *Burson v. Freeman,* 504 U.S. 191, 211 . . . (1992)).
>
> However, the alleged harms recited by the appellees cannot be characterized as matters upon which there is longstanding consensus or upon which all can agree . . .

Pagan, 492 F.3d at 774 n.6. A "common sense" argument is insufficient to justify a restriction on commercial speech in the absence of "matters upon which there is longstanding consensus or upon which all can agree." *Id.* Here, neither a long history nor substantial consensus nor common sense supports the constitutionality of Section 1704.109(b).

The Board has asserted that "common sense" supports Section 1704.109(b). Although common sense suggests that a party must adhere to the restrictions it has voluntarily agreed to abide by, as with the anti-recruiting rule in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy,* ___ U.S. ___, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (June 21, 2007), Pruett never agreed to waive his, or his prospective customers', First Amendment rights.

Without a private contractual agreement to refrain from speaking, such as a private anti-recruiting rule, the Board's references to "common sense" reflect the fallback position of a government that lacks legislative history, studies, reports, or statistics. As Judge Alex Kozinski and Professor Stuart Banner observed, "the more frequently common sense is invoked to support a proposition, the less likely it is to reflect common sense . . . " Kozinski and Banner, *Who's Afraid of Commercial Speech?,* 76 VA. L. REV. 627, 634 n.7 (1990). In 1942, it was common sense, in *Valentine,* to deny that commercial speech was entitled to any First Amendment protection, while in 1976, in *Virginia State Board,* it was common sense to recognize entitlement to First Amendment protection. Absent a private contractual agreement, common sense is a poor foundation on which to build First Amendment freedoms.

Without a long history, consensus, common sense, studies, surveys, statistics, or even anecdotes about

independent-bondsmen, the Board could not prove that Section 1704.109(b) was constitutional under *Edenfield*. Assuming, *arguendo*, that (1) a "long history," (2) a "substantial consensus," and (3) "simple common sense" were enough to uphold a restriction on speech, the Board did not bear its burden of proving that its unnecessary, replete-with-exceptions statute had a "long history," "substantial consensus," and "simple common sense."

Pruett provides useful, truthful, public-record, JIMS information to contactees and does not engage in "repeated communications," the only constitutionally permissible interpretation of "harassment" under *Commission for Lawyer Discipline v. Benton,* 980 S.W.2d 425, 439-440 (Tex. 1998). Just as the single letter that attorney Benton sent post-trial to each juror did not constitute "harassment," the single call Pruett makes to tell a parent, spouse, or child of a jailed citizen that a bondsman is available to post bail is not "harassment." *Id.* at 439-440. A call helps a citizen exercise her constitutionally-protected right to post bond, retain counsel, and leave jail. The Board misinterprets "harassment" to mean annoyance. But in *Coates v. Cincinnati,* 402 U.S. 611, 614 (1971), this Court held that "harass" is unconstitutionally vague when the State misinterprets it to mean "annoy." *Id.* at 614.

Section 1704.109(b)(2)(A) has no "long history." The Legislature enacted it in 2003, and the first court that considered its constitutionality struck it down twenty months later. Even the Board's Local Rules 24

and 25 date back only to 2001. Pruett Cross-Appendix 1 at App. 5-9. Harris County District Judge Levi Benton entered a Temporary Restraining Order within ten days of the Board enforcing them against Pruett, and Harris County District Judge John Coselli then entered a temporary and a permanent injunction against their enforcement. The Fifth Circuit could not cite a "long history" to justify its reversal of Judge Hoyt's ruling about late night calls.

Furthermore, the Legislature considered no evidence of any (non-existent) "consensus" favoring restrictions. There was no pre-enactment legislative record, hence no evidence of "consensus." There was no pre-enactment evidence of "consensus" among law officers. R. 52 at 3601-3603; R. 53. Nor was there consensus among people complaining about calls. R. 47 at 2712-13 & 2884-2919; R. 46 at 2675-78.

In the total absence of *any* studies, surveys, or statistics – either pre- or post-enactment – to show whether a majority of people would rather receive an independent-bondsman's late night call or prefer instead to remain blissfully ignorant of a loved one's incarceration, the Board cannot show anything other than a statute that keeps people uninformed about matters that have a major impact on families. "Common sense" dictates that most people care about their spouse, child or parent enough to sacrifice a little sleep. So, too, does the Bible, classical literature, and the principles of evolutionary biology. Most people would prefer an independent-bondsman's late night or early morning call rather than let a loved one spend a night in fear, contract a disease from an

inmate, experience a physical assault, or suffer a jail-rape. Pruett Cross-Appendix 3 at App. 22-23. The bondsman's late night calls minimize those dangers. Here, a paternalistic Board seeks to keep the bondsman's potential customers in the dark to protect a few surety companies and their agents from the independent-bondsman's competition.

CONCLUSION

Cross-Petitioners Carl R. Pruett and Scott respectfully request this Court to GRANT their Cross-Petition for a Writ of *Certiorari* to the Fifth Circuit.

Respectfully submitted,

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PLAINTIFF'S APPENDIX/EXCERPT 1

[USCA5 3017]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL R. PRUETT AND SCOTT MARTIN,	)	
Plaintiffs,	)	CIVIL ACTION
versus	)	NO. H-03-3241
THE HARRIS COUNTY BAIL BOND BOARD and HARRIS COUNTY,	)	
Defendants.	)	

****

ORAL DEPOSITION OF

ROGER MOORE

MARCH 29, 2004

****

ORAL DEPOSITION OF ROGER MOORE, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 29th of March, 2004, from 10:10 A.M. to 12:40 P.M., before Ken Owen, CSR, in and for the State of Texas, reported by machine shorthand, at the offices of Gray & Becker, 900 West Avenue, Austin, Travis County, Texas,

pursuant to the Federal Rules of Civil Procedure, Subpoena, and the provisions stated on the record or attached hereto.

[USCA5 3018]

[2] APPEARANCES

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* * *

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ROGER MOORE

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* * *

EXHIBIT INDEX

EX. NO.	DESCRIPTION	MARKED
1	Notice of deposition, attachments	5
2	Amended notice of deposition, attachments	5
3	(EXHIBIT WITHDRAWN)	–
4	Draft bill dated 12/10/02	5
5	Draft bill dated 1/22/03	5

[4] EXHIBIT INDEX (CONTINUED)

EX. NO.	DESCRIPTION	MARKED
6	Draft bill dated 2/21/03	5
7	Draft of language that became 1704.109(b)	5
8	Draft of amendment to SB 1336, dated 4/9/03	5

9	Letter dated 4/16/03 to Jerry Watson	5
10	Moore's black-lined version of Chapter 1704	5
11	Legislature Online, Bill Actions for SB 1336	5
12	Legislature Online, Bill Actions for HB 2729	5
13	Letter dated 3/12/03, IFIC & Allegheny agents	5
14	Dated list complied by Mr. Moore for dep	58

* * *

[5] (Deposition Exhibits 1-13 marked)

ROGER MOORE

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. FURLOW:

Q. Would you state your name for the record?

A. Roger Moore.

Q. Business address, please?

A. Physical address is 900 West Avenue, 3rd Floor, Austin, Texas, 78701.

Q. All right. Personal address, please, just here in the Austin –

A. Home address?

Q. Yes, sir.

A. 5203 Maulding, M-a-u-l-d-i-n-g, Pass, Austin, 78749.

Q. Would you state your current position at International Fidelity Insurance Company?

A. I am Texas counsel for International Fidelity, and I'm assistant secretary for that company as well.

Q. Can you state your current positions at Allegheny Casualty Company?

A. The same two positions.

Q. All right. Can we agree to refer to International Fidelity as "IFIC" for short?

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[6] A. Sure.

Q. Okay. Can we agree to refer to Allegheny Casualty Company as "Allegheny" for short?

A. Okay.

Q. And can we agree to refer to the Harris County Bail Bond Board as just "the Board"?

A. Okay.

Q. Aside from the state court lawsuit that Carl Pruett filed against the Harris County Bail Bond

Board, which is now on appeal to the First Court of Appeals – aside from that, number one, and this suit, member two, are you aware of any other lawsuits or arbitrations currently in existence regarding the constitutionality of solicitation rules or statutes as applied to bail bondsmen?

A. I'm not aware of any in Texas.

Q. Are you aware of any others from outside of Texas?

A. No.

Q. Are you aware of any published decisions regarding the constitutionality of bail bondsmen solicitation rules anywhere in the country?

A. No.

Q. Earlier today your counsel produced a set of documents that I have marked as Deposition Exhibits 4 to 13, in order to pick up on the fact that we've already got a few [7] that are pre-marked as 1 through 3 to your deposition.

Would you look through those deposition exhibits, 4 to 13, and confirm that those are in fact the documents you are producing here today?

A. Yes, they are.

Q. Those are true and correct copies of original documents, either in your possession or printed off from your own personal computer?

A. That's correct.

Q. And you have produced those documents, Deposition Exhibits 4 through 13, in response to the copy served on you of PX-1 and PX-2, the first amended and second amended deposition notices for your deposition. Correct?

A. That's correct.

Q. And the documents that you have produced here, these Deposition Exhibits 4 through 13, reflect your efforts to produce documents that are responsive to the categories in the subpoena duces tecum portions of Plaintiff's Exhibits 1 and 2, or PX-1 and 2?

A. That's right.

Q. All right. Are there any documents in your possession, IFIC's possession, or Allegheny's possession, that are responsive to plaintiffs' subpoenas in PX-1 and 2, but were not produced today, for whatever reason?

A. None that I'm aware of.

[8] Q. It would be correct to say that you are familiar, then, with, and have in fact read the subpoena duces tecum portions of these PX-1 and 2 exhibits?

A. That's correct.

Q. First of all, I'll ask you to go to Request No. 1 under PX-2. Just forget about PX-1 and lay that aside.

And have you found that, Request No. 1 there in Exhibit B?

A. Yes.

Q. Do you see where it says, "Any studies, polls, market surveys, opinion surveys, or other documents that relate to the public's understanding, opinions, or perceptions of the bail bonding business and/or individual bail bondsmen from the period from January 1, 1999 through the date that the custodian of records' response" – which is you, here – "the subpoena duces tecum in the possession of Roger Moore, International Fidelity Insurance Company and/or Allegheny Casualty Company"?

A. I see that.

Q. All right. And have you produced any such documents here to response to that subpoena duces tecum?

A. No.

Q. Would that reflect the fact that yes know of no such documents in any way responsive to Request No. 1?

A. That's correct.

[9] Q. Okay. Let me follow up on that. Has IFIC ever commissioned, paid for or sponsored any studies that relate to the public's understanding opinions, or perceptions of the bail bonding business?

A. None that I've ever heard of.

Q. Or of individual bail bondsmen?

A. No.

Q. Has Allegheny ever done so?

A. None that I've ever heard of.

Q. Are you aware of any private company that has ever commissioned, paid for or sponsored any studies, polls, market surveys or opinion surveys that relate to the public's understanding, opinions, or perceptions of bail bondsmen?

A. I've never heard of any.

Q. Okay. Are you aware of any Harris market survey or Gallop opinion poll that has measured or surveyed consumer opinions about the bail bonding business in general?

A. No, I've not heard of any such survey.

Q. Are you aware of any nonprofit organization that has ever commissioned or paid for or instituted any studies of the public's perception of the bail bonding business?

A. No.

Q. Are you aware of any foundation or university that has sponsored or paid for or commissioned any such study or survey?

* * *

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[22] appointed by the president of that organization.

Q. Who was the president of PBOT in 2003 when you submitted PX-4 to them?

A. That was Ken Knowles, K-n-o-w-l-e-s, from Wichita Falls.

Q. Would you please identify and authenticate PX-5?

A. Exhibit 5 is a later date of potential legislation. I computer dated it at January 22nd of '03. And it again would have been a proposal to amend Chapter 1704 of the Occupations Code.

Q. And you prepared that while serving as Texas Counsel and Secretary of IFIC and Allegheny. Is that correct?

A. Assistant secretary for Allegheny and International, that's correct.

Q. Okay. Did this PX-5 reflect your reconsideration of the proposals that were set forth in PX-4?

A. It includes many of the same provisions, but it makes some changes.

Q. What intervening events do the changes in PX-5 reflect?

A. Well, PX-4 had included a provision that would have broadened the application of that chapter to require the creation of boards in smaller counties,

and that provision got dropped on the advice of the lobbyist for PBT.

[23] There was a minor change in an amendment to Section 1704.152 concerning who could deliver the mandatory continuing education that bondsmen have to undergo periodically.

There was a deletion from the December draft that would have restricted the ability of attorneys to act as bondsmen without being licensed.

Again, that was after doing some discussions with the lobbyist.

Q. Who is that lobbyist, by the way?

A. Jim Warren, W-a-r-r-e-n.

Q. All right.

A. Then there was a minor change in how a repealer was included that dealt with a provision that in 2001 had enacted two different and slightly conflicting versions of Section 303 of Chapter 1704. Both of these drafts resolved that minor conflict, but they did it in different ways.

Q. Very well. PX-5, your draft of January 22, 2003, contained no proposed language imposing restrictions on bail bondsmen solicitation of the open warrants business. Is that correct?

A. That's right. I had not yet met with the PBT legislative committee as of January 22nd of '03.

Q. When did you actually meet with the PBOT legislative committee and discuss solicitation issues?

[24] A. February 14th of '03.

Q. Who did you meet with at that time? The same people you discussed earlier?

A. I don't recall whether Sandra Cable was there. I think everybody else I mentioned was there. And I'm certain there were other people there as well. I know Ken Knowles was there at that meeting, for example.

Q. All right.

A. And there were other non-members of the legislative committee who were entitled to be present and observe, but could not participate in the discussion or the votes that the committee took.

Q. All right. Would you identify and authenticate Deposition Exhibit 6?

A. Exhibit 6 is a further legislative draft that my computer dated as the 21st of February of '03.

Q. And that is a true and correct copy of the draft that you then submitted to whom?

A. I believe that this draft went to the PBT lobbyists to get put into bill form by legislative counsel.

By then, there had already been a sponsor lined up for our proposed bills; and in fact an earlier draft

had already gone to the legislative counsel. And so this bill draft, Exhibit 6, wound up going to the offices of that sponsor, Representative Robert Talton, for him to send over [25] to legislative counsel and have it put into bill draft form by the Texas Legislative Council.

Q. Who was the Legislative Council for the bill that you just referenced?

A. The Legislative Council is an agency of state government that works for the legislature.

It's c-o-u-n-c-i-l.

Q. Okay.

A. And it's a group of lawyers and support staff who draft bills for the legislature and provide other support services. They also are the, I guess, official repository for bill drafts and bills actually enacted by the legislature, as well as they maintain the web site that shows all the various actions taken by the legislature.

Q. So would it be correct to say that PX-6, your document from February of 2003, was the first draft of proposed legislation that was actually tendered to Representative Talton?

A. No, that's not correct.

Q. Would that be PX-5?

A. I don't know whether it was PX-4 or 5, but – and I'd have to just go back and look at the original

draft of House Bill 2729 to know which of these two would up going to the council for the first draft, but one of those two was submitted by Mr. Warren to the staff of Robert Talton's [26] office, and one of those two was the bill that was actually filed as House Bill 2729.

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Exhibit 6 then went off to the council and became part of an amendment, either a committee substitute or a committee amendment to House Bill 2729.

Q. Okay. Now, with respect to PX-6, that contains the first revision to existing Section 1704.109 and its regulation of advertising and solicitation. Is that correct?

A. Exhibit 6 was the first bill draft from me that included a modification to 1704.109.

Q. Okay. And that reflects the fact that you had previously had a meeting with the PBOT legislative committee approximately within the preceding ten days. Would that be correct?

A. In part.

Q. What else does it reflect?

A. Well, the change that appears to 1704.109 – I'm sorry. Ms. Hunter has just pointed out to me that what I thought was a change as a result of that meeting was already there.

All three of the drafts that we've talked about – Exhibits 4, 5 and 6 – contain a change to Section 1704.109, and the change is identical through all three of the drafts.

The additional change that later became part of state law was a change that we discussed at that February [27] 14th meeting, it was a change that the PBT legislative committee agreed to, but the proviso of that agreement was to add it, if we could do so without – without killing the prospects of having the remainder of House Bill 2729 enacted. And we left that judgment call to the judgment of the PBT lobbyists.

Q. All right. Would it be correct to say, then, that PX-4 and PX-5 contained changes to what you now know as Section 1704.109.A, the advertisement and solicitation regulation provision?

A. I need to look at one of the other exhibits to know whether that's correct. (Pause).

That's correct. Exhibits 4, 5 and 6 contain a change that ultimately became part of Section 1704.109.A.

Q. All right.

A. And I'm looking at Exhibit 10 to verify that.

Q. All right. Would you please now identify and authenticate PX-7, Deposition Exhibit 7?

A. Yes. Exhibit 7 is a draft of language that became 1704.109(b). And this is language drafted by me.

Q. When did you actually draft that language?

A. April 8th of '03.

Q. Were there any previous drafts of that language in which you tried to express those thoughts?

A. Not that I recall.

[28] Q. What particularly led you to draft that – shall we refer to it as "Subsection B"? – language?

A. Do you want the whole story, or the triggering event?

Q. The triggering event.

A. The triggering event was a meeting held in Austin with about twelve or fifteen district and county attorneys from all around the state.

Q. All right. And what was the nature of the discussions of that meeting?

A. Well, there were a number of different things at the meeting. Do you want those related solely to Exhibit 7, or the whole bit?

Q. First of all, just an overview of what that meeting – first broadly, and then specifically as it relates to PX-7.

A. Okay. This is going to be a long answer. In early March we were contacted by the Texas District Attorney – Texas District and County Attorneys Association's executive director, to see whether we might be interested in sitting down with him and the president of that organization to see whether, on a number of issues where the bail bonding industry and the prosecutors had historically been at loggerheads, we might be able to reach agreements.

And so we had that meeting in Austin March, 10th.

[29] Q. One question. Was Rob Kuepel present at that meeting?

A. Yes. Rob Kuepel is the executive director. And also present was Jaime Esparza, the president of the TDCAA, as well as me; Tillmin Welch for the PBT legislative committee; and Jim Warren, the lobbyist for PBT.

So this proposal was put on the table by the TDCAA, that we would attempt to reach agreement on the proposal that we called "time certain," and that the industry had attempted to enact into state law for as long as I've been involved in the legislative process, which goes back at least to the 1997 session.

If we could hammer out something that they thought they could live with, then they proposed that they would not lobby against its passage. And, in return, they wanted us to sit on our hands, if you will, and not oppose a proposal that they had in the works

to create an alternative source of funding for longevity pay for certain felony prosecutors.

So that triggered off a chain of events where there were meetings held back and forth on our side, meetings held with them to explore those possibilities. And those led to a meeting of various elected district attorneys and county attorneys – there were like three or four or five – on April 3rd.

* * *

PLAINTIFF'S APPENDIX/EXCERPT 2

[USCA5 451]

C.S.H.B. 2729 78(R) BILL ANALYSIS

C.S.H.B. 2729
By: Talton
Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Section 1704 of the Occupations Code governs the powers, duties and responsibilities of bail bond boards and the regulation, professional requirements and conduct of bail bond sureties. The 76th Legislature codified the Bail Bond Act into the Occupations Code, and the 77th Legislature adopted numerous amendments to the code. The purpose of C.S.H.B. 2729 is to clarify many areas of the code to address problems or ambiguities in current law.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2729 modifies the definition of "bonding business" and defines "final judgment" for purposes of bond forfeitures, clarifies who may serve on the bail bond surety board, creates a uniform system for

electing surety representation to the board including clarifying who may vote on board matters, specifies the duties and obligations required of boards and licensees, imposes advertising and solicitation restrictions, and provides for the maintenance and inspection of bail bond records. The bill clarifies who is eligible for a license, refines the application and renewal process, including specifying the grounds under which an application can be rejected, suspended or reinstated and provides instructions for action of the bail bond board if a bail bond surety fails to pay a final judgement. The bill clarifies when a final judgment should be paid and how a person executing a bail bond may surrender the principal for whom the bond is executed. Finally, C.S.H.B. 2729 specifies how long and for what reasons a bail bond surety may hold security for the payment of a bail bond fee or the principal's appearance in court.

EFFECTIVE DATE

September 1, 2003.

COMPARISON OF ORIGINAL TO SUBSTITUTE

The substitute modifies several sections of the bill, further clarifying existing ambiguities. The substitute modifies the definitions of "bonding, business" and "final judgement," clarifies that bail bond surety or agent for a corporate surety may serve on the bail bond board, and removes the election of an alternate representative of licensed bail bond sureties to serve

on the bail bond board included in the filed version of the bill. The bill also adds language regulating the solicitation of business for bail bond sureties, specifies that criminal law courses taken to satisfy license requirements must be taken in person, and changes other procedures [USCA5 452] in licensing new bail bond agents and sureties. The substitute provides instructions for action of the bail bond board if a bail bond surety fails to pay a final judgement, clarifies when a final judgement should be paid and how a person executing a bail bond may surrender the principal for whom the bond is executed. The substitute also adds a section that specifies procedure of a board if a bail bond surety fails to pay a final judgement. Finally, the substitute removes the ability to file a petition in Travis County and how long and for what reasons a bail bond surety may hold security for the payment of a bail bond fee.

PLAINTIFF'S APPENDIX/EXCERPT 3

[USCA5 2885]

AFFIDAVIT

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, did appear the below named person who did state the following after being duly sworn and placed under oath:

"My name is Scott A. Frnka, TDL/TID # xxxxxxxx, SSN: xxx-xx-xxxx I am the person who paid the bail bond fee for Kayla L. Frnka Cause # 1118398 on this date. I was initially contacted by a representative of ALLIED BONDING AGENCY at 5:00 a.m. on this date and informed that said party was incarcerated, that charges had been filed and that the bonding process could be initiated at that time to secure their release from jail. I did not consider this call to be harassment in any way, but instead was very informative, most helpful and very beneficial. I did appreciate receiving this information from ALLIED as it made the process of securing the release of the defendant smoother, faster, and as efficient as possible, even though I was not too pleased to discover that they were in jail.

Additional comments: _____

_____

All of the above statements are true, correct, and within my personal knowledge.

Signed this the 31st day of May, 2002.

/s/ Scott A. Frnka
Affiant

Sworn to and subscribed before me this the 31 day of May, 2002.

/s/ Maria G. Ramirez
NOTARY PUBLIC FOR
THE STATE OF TEXAS

[SEAL]

MARIA G. RAMIREZ
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
DEC. 20, 2003

PLAINTIFF'S APPENDIX/EXCERPT 4

[USCA5 459]

HARRIS COUNTY BAIL BOND

BOARD MEETING MINUTES

1001 PRESTON, 9TH FLOOR

JULY 9, 2003

1:00 P.M.

* * *

[USCA5 465]

[22] JUDGE ANDERSON: Items 1 and 2 are passed for next month. And I think that concludes our usual business; and I believe Ms. Braddock's got a new matter to discuss briefly, folks. We've got some new legislation just kicked in, I think, June 20th, we have to deal with the next few months and Kathy will update for your viewpoint, if any.

MS. BRADDOCK: Senate Bill 1336 passed by ⅔ majority of both the House and Senate. It kicked in immediately on June 20th. We'll need to change some of the ways that we enact, some of our rules. In addition, it has added a new member to the Bail Bond Board who will be a defense attorney and I have suggested that Judge Anderson as the chairman of the Board right to the Harris County Defense Attorney's Association just to let them know that they're now entitled to have an election until Judge Anderson is Chairman of the Board who they wish to sit and

tell and when and where our meetings are so they can have their representative present.

And in addition, I guess, that I will look specifically at the Rules and at Senate Bill 1336 and have a formal agenda item next month for changes that we need to make in our local rules or our new rules that we need to adopt as well as request an executive session for the county attorney's office and other attorneys [23] involved in litigation with the Bail bond board to inform us how any legislative changes may affect our litigation status in different cases.

JUDGE ANDERSON: Good deal. Okay. Anymore last minute business before here?

MR. MOSLEY: –

THE REPORTER: I'm sorry. I can't hear.

JUDGE ANDERSON: Just put down mumble. Okay, folks, we are adjourned. Thanks for your cooperation.

(Meeting adjourned at 1:35 p.m.)

[24] STATE OF TEXAS)
)
COUNTY OF HARRIS)

REPORTER'S CERTIFICATE

I, Rita Frangullie, Certified Shorthand Reporter for the State of Texas, do hereby certify that the foregoing proceedings were reported by me and that

the foregoing transcript constitutes a full, true, and correct transcription of my stenographic notes.

I further certify that I am neither attorney nor counsel for, related to, nor employed by and of the parties to the action in which these proceedings were taken. Further, I am not a relative nor employee of any attorney of record in this cause, nor do I have a financial interest in this action.

Subscribed and sworn to on this ___ day of ___, 2003.

RITA FRANGULLIE, CSR #7847
Expiration Date: 12/31/03
Q&A Reporting, Inc.
10220 Memorial Drive, #22
Houston, Texas 77024
713.467.7900

PLAINTIFF'S APPENDIX/EXCERPT 5

[USCA5 4694]

Complaint: 03-009

Date: 10/09/2003

Complainant: Mary Przyborski
6807 Dusty Dawn
Houston, TX. 77086
Phone: Home (281) 447-5815
work (713) 466-2516

Re: Solicitation Complaint

Company: National American Ins. Co.
Agent: Carl Pruett
License No.: 74333

On Wednesday October 8, 2003 at 1236 hrs I received an "Affidavit" from IFIC Agent James Coghlan, license #74294. Employee Maggie Gonzales took the "Affidavit" from Mary Przyborski on September 16, 2003. Mary Przyborski stated in her affidavit that "Carl" at Allied Bail Bonds solicited her on Tuesday September 16, 2003 at 0800 hrs. Mary Przyborski informed Carl that she was currently working with a bonding company to obtain her sons release.

On Thursday October 9, 2003 at 1130 hrs I contacted Mary Przyborski at (713) 466-2516. I told her that I received her complaint affidavit yesterday and that I need some additional information from her. Mary Przyborski then stated that she was told to fill out the affidavit by her bondsman when she explained that another bonding company had contacted her. I

then asked Mary Przyborski if she wanted to pursue a complaint against Allied Bonding Company. She stated that she only filled out the affidavit because she was asked to by her bondsman. She said that the bonding company told her that it was illegal for her to be solicited for a bond and asked her to fill out the form they provided. Mary Przyborski said that she did not want to provide a sworn statement and asked me not to be mad at her. I explained to her why the bonding company wanted her to file a complaint and that she was not being forced to file any complaint against any one if she did not want to. Mary Przborski then stated that she did not want to file a complaint in the first place; she was under the impression that she was merely providing a statement to the bonding company. Mary Przyborski stated that the call did cause some confusion because her bonding company could not locate the information and it appeared to her that "Carl" possessed the information approximately an hour sooner than James Coughlin.

[USCA5 4695] Investigation Timeline:

1) Defendant arrested at 0130 hrs September 16, 2003
2) Def. DIMS shortly after arrest on September 16, 2003
3) Mary Przyborski was working on sons bail waiting for information at 0800 hrs
4) Defendant received at IPC @ 0702 hrs

5) At 0800 hrs Mary received phone call "Carl" at Allied Bail Bonds

6) At 0900 hrs James Coghlan obtained bonding information

7) Bond posted at 1419 hrs on September 16, 2003

8) Defendant released from custody on September 16, 2003 at 1715 hrs.

Summary:

Complainant did not want to pursue complaint. Complainant felt that the phone call confused matters. Complainant did state that it appeared that "Carl" possess the information for the bail bond approximately one hour earlier than her bondsman. No action will be taken due to lack of a complainant.

PLAINTIFF'S APPENDIX/EXCERPT 6

TEXAS OCCUPATIONS CODE

§ 1704.109. Solicitation and Advertisement

(a) A board by rule may regulate solicitations or advertisements by or on behalf of bail bond sureties to protect:

(1) the public from:

(A) harassment;

(B) fraud;

(C) misrepresentation; or

(D) threats to public safety; or

(2) the safety of law enforcement officers.

(b) A bail bond surety, an agent of a corporate surety, or an employee of the surety or agent may not make, cause to be made, or benefit from unsolicited contact:

(1) through any means, including in person, by telephone, by electronic methods, or in writing, to solicit bonding business related to an individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has an existing bail bond on the individual; or

(2) in person or by telephone to solicit bonding business:

(A) that occurs between the hours of 9 p.m. and 9 a.m.; or

(B) within 24 hours after:

(i) the execution of an arrest warrant on the individual; or

(ii) an arrest without a warrant on the individual.

(c) This section does not apply to a solicitation or unsolicited contact related to a Class C misdemeanor.

TEXAS BUSINESS AND COMMERCE CODE

CHAPTER 37. TELEPHONE SOLICITATION

Section

37.01. Definitions.
37.02. Solicitor Identity; Permissible Hours; Disconnect.
37.03. Charges to Consumer Credit Account.
37.04. Enforcement.
37.05. Civil Penalty.

§ 37.01. Definitions

In this chapter:

(1) "Automated dialing announcing device" means automated equipment used for telephone solicitation or collection that is capable:

(A) of storing telephone numbers to be called or has a random or sequential number generator capable of producing numbers to be called; and

(B) alone or in conjunction with other equipment, of conveying a prerecorded or synthesized voice message to the number called without the use of a live operator.

(2) "Consumer" means a person who is solicited to purchase, lease, or receive a consumer good or service.

(3) "Consumer good or service" means:

(A) real property or tangible or intangible personal property that is normally used for personal, family, or household purposes, including personal property intended to be attached to or installed in any real property;

(B) a cemetery lot;

(C) a time-share estate; and

(D) a service related to real or personal property.

(4) "Consumer telephone call" means an unsolicited call made to a residential telephone number by a telephone solicitor to:

(A) solicit a sale of a consumer good or service;

(B) solicit an extension of credit for a consumer good or service; or

(C) obtain information that will or may be used to directly solicit a sale of a consumer good or service or to extend credit for the sale.

(5) "Telephone solicitor" means a person who makes or causes to be made a consumer telephone call, including a call made by an automated dialing device.

Added by Acts 1991, 72nd Leg., ch. 494, § 1, eff. Jan. 1, 1992.

---

§ 37.02. Solicitor Identity; Permissible Hours; Disconnect

(a) A telephone solicitor may not make a consumer telephone call to a consumer unless:

(1) the telephone solicitor identifies himself or herself by name and identifies the business on whose behalf the telephone solicitor is calling and the purpose of the call immediately after making contact with the consumer to whom the call is made;

(2) the telephone solicitor makes the call after 12 noon or before 9 p.m. on a Sunday or after 9 a.m. and before 9 p.m. on a weekday or a Saturday; and

(3) for those calls in which an automated dial announcing device is used, the device must disconnect the consumer's telephone line within the period provided by Section 55.126, Utilities Code, after termination of the call by either the telephone solicitor or the consumer.

(b) A consumer telephone call is not subject to the provisions of Subsection (a) of this section if the call is made:

(1) in response to the express request of the consumer;

(2) primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call; or

(3) to a consumer with whom the telephone solicitor has a prior or existing business relationship.

Added by Acts 1991, 72nd Leg., ch. 494, § 1, eff. Jan. 1, 1992. Amended by Acts 1999, 76th Leg., ch. 667, § 1, eff. Sept. 1, 1999.

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§ 37.04. Enforcement

(a) The attorney general's office shall investigate a complaint relating to a violation of this chapter and may petition a district court for a temporary restraining order to restrain a continuing violation of this chapter and for the assessment of a civil penalty as provided by Section 37.05 of this code.

(b) A district court, on petition of the attorney general's office and on a finding by the court that a person is violating this chapter may, by injunction, prohibit a person from continuing a violation of this chapter or grant any other injunctive relief warranted by the facts.

(c) Venue for a suit brought under this chapter is in:

(1) the county in which the consumer telephone call originated;

(2) the county in which the consumer telephone call was received; or

(3) Travis County.

Added by Acts 1991, 72nd Leg., ch. 494, § 1, eff. Jan. 1, 1992.

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§ 37.05. Civil Penalty

(a) A person who knowingly violates this chapter is liable for a civil penalty of not more than $10,000 for each violation.

(b) In addition to bringing an action for injunctive relief, the attorney general may also seek restitution and civil penalties as provided herein.

(c) A consumer injured by a violation of this chapter may bring any action for recovery of damages. The damages awarded may not be less than the amount paid by the buyer to the telephone solicitor, plus reasonable attorney fees and court costs.

Added by Acts 1991, 72nd Leg., ch. 494, § 1, eff. Jan. 1, 1992.

CHAPTER 38. REGULATION OF TELEPHONE SOLICITATION

SUBCHAPTER A. GENERAL PROVISIONS

Section

38.001. Definitions.
38.002. Making Telephone Solicitation.
38.003. Construction and Application.

[Sections 38.004 to 38.050 reserved for expansion]

SUBCHAPTER B. EXEMPTIONS

38.051. Claim of Exemption.
38.052. Exemptions Apply to Seller.
38.053. Persons or Items Regulated by Other Law.
38.054. Media and Subscription Services and Certain Catalogs.
38.055. Certain Nonprofit and Educational Organizations.
38.056. Certain Commercial Sales.
38.057. Food.
38.058. Solicitation of Current or Former Customers.
38.059. Promotions at Established Retail Sales Locations or at Consumer's Residence.
38.060. Certain Solicitation Services Having Predominately Exempt Customers.
38.061. Certain Isolated Solicitations.

[Sections 38.062 to 38.100 reserved for expansion]

SUBCHAPTER C. REGISTRATION

38.101. Registration Required.
38.102. Contents of Registration Statement; Verification; Public Information.
38.103. Filing Fee.
38.104. Issuance of Certificate of Registration.
38.105. Effective Date; Renewal.
38.106. Update Addendum Required.
38.107. Security.
38.108. Secretary of State as Seller's Agent to Receive Service.

[Sections 38.109 to 38.150 reserved for expansion]

SUBCHAPTER D. DISCLOSURES REQUIRED IN REGISTRATION STATEMENT

38.151. Disclosure of Certain Names, Addresses, and Organizational Information.
38.152. Disclosure of Certain Convictions, Judgments, Orders, and Bankruptcies.
38.153. Disclosure of Certain Sales Information.

[Sections 38.154 to 38.200 reserved for expansion]

SUBCHAPTER E. ADDITIONAL INFORMATION FROM SELLER

38.201. Information Posted or Available at Seller's Business Location.
38.202. Disclosures to Prospective Purchasers.
38.203. Reference to Compliance With Statute Prohibited

[Sections 38.204 to 38.250 reserved for expansion]

SUBCHAPTER F. OFFENSES

38.251. Violation of Chapter.
38.252. Salesperson for Unregistered Seller.
38.253. Request of Credit Card Account Number or Checking Account Number After Offer of Free Item.

§ 38.001. Definitions

In this chapter:

(1) "Item" means property or service and includes a coupon book that is to be used with a business or company.

(2) "Owner" means a person who has control of or is entitled to, by ownership or the claim, at least 10 percent of the net income of a seller.

(3) "Purchaser" means a person who is:

(A) solicited to become or becomes obligated for the purchase or rental of an item; or

(B) offered the opportunity to claim or receive an item.

(4) "Salesperson" means a person employed or authorized by a seller to make a telephone solicitation.

(5) "Seller" means a person who makes a telephone solicitation on the person's own behalf.

(6) "Supervised financial institution" means a bank, trust company, savings and loan association, credit union, industrial loan company, personal

property broker, consumer finance lender, commercial finance lender, insurer, or other financial institution that is subject to supervision by an official or agency of this state or the United States.

(7) "Telephone solicitation" means a telephone call initiated by a seller or salesperson to or from a person for the purpose of inducing the person to purchase, rent, claim, or receive an item. The term includes a call made by a purchaser in response to a solicitation sent by mail or made by any other means.

Added by Acts 1997, 75th Leg., ch. 1008, § 2, eff. Sept. 1, 1997.

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§ 38.052. Exemptions Apply To Seller.

The exemptions provided by this chapter apply only to a seller engaging in a telephone solicitation on the seller's own behalf.

Added by Acts 1997, 75th Leg., ch. 1008, § 2, eff. Sept. 1, 1997.

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§ 38.053. Persons Or Items Regulated By Other Law

This chapter does not apply to:

(1) a person offering or selling a security that has been qualified for sale under Section 7, The Securities Act (Article 581-7, Vernon's Texas Civil

Statutes), or that is subject to an exemption under Section 5 or 6 of that Act;

(2) a publicly traded corporation registered with the Securities and Exchange Commission or the State Securities Board, or a subsidiary or agent of the corporation;

(3) a person licensed under the Insurance Code if the solicited transaction is governed by the Insurance Code;

(4) a supervised financial institution or parent, subsidiary, or affiliate of a supervised financial institution;

(5) a person or affiliate of a person whose business is regulated by the Public Utility Commission of Texas, except that this chapter applies to a person or affiliate of a person who is regulated by the Public Utility Commission of Texas only with respect to one or more automated dial announcing devices;

(6) a person subject to the control or licensing regulations of the Federal Communications Commission;

(7) a person selling a contractual plan regulated by the Federal Trade Commission trade regulation on use of negative option plans by sellers in commerce under 16 C.F.R. Part 425;

(8) a person subject to the filing requirements of Chapter 1803, Occupations Code; or

(9) a person soliciting a transaction regulated by the Commodity Futures Trading Commission if the person is registered or temporarily licensed for that activity with the Commodity Futures Trading Commission under the

* * *

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§ 38.059. Promotions at Established Retail Sales Locations or at Consumer's Residence

This chapter does not apply to:

(1) a person soliciting:

(A) without intent to complete or obtain provisional acceptance of a sale during the telephone solicitation;

(B) who does not make the major sales presentation during the telephone solicitation but arranges for the major sales presentation to be made at a later face-to-face meeting between the salesperson and the purchaser; and

(C) who does not cause an individual to go to the prospective purchaser to collect payment for the purchase or to deliver an item purchased directly following the telephone solicitation; or

(2) a person who for at least two years has been operating under the same name as that used in connection with its telemarketing operations a retail establishment where consumer goods are displayed and offered for sale continuously if a majority of the

person's business involves the buyers obtaining services or products at the person's retail establishment.

Added by Acts 1997, 75th Leg., ch. 1008, § 2, eff. Sept. 1, 1997.

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§ 38.060. Certain Solicitation Services Having Predominately Exempt Customers.

(a) This chapter does not apply to a person:

(1) who provides telephone solicitation services under contract to sellers;

(2) who has been operating continuously for at least three years under the same business name; and

(3) for whom at least 75 percent of the person's contracts are performed on behalf of other persons exempt under this section.

(b) Notwithstanding Section 38.052, the exemption provided by this section applies to a person providing telephone solicitation services to sellers.

Added by Acts 1997, 75th Leg., ch. 1008, § 2, eff. Sept. 1, 1997.

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§ 38.061. Certain Isolated Solicitations

This chapter does not apply to a person engaging in a commercial telephone solicitation that is an isolated transaction and not done in the course of a pattern of repeated transactions of a similar nature.

Added by Acts 1997, 75th Leg., ch. 1008, § 2, eff. Sept. 1, 1997.

TEXAS
INSURANCE CODE

CHAPTER 3503. SURETY BONDS AND RELATED INSTRUMENTS

SUBCHAPTER A. CERTAIN REQUIRED OR PERMITTED OBLIGATIONS

Section

3503.001. Definitions.
3503.002. Execution of Obligation by Surety Company.
3503.003. Designation of Agent by Corporate Surety Required.
3503.004. Written Certification of Reinsurance as Condition of Acceptance of Obligation.
3503.005. Additional Requirements for Certain Bonds.
[Sections 3503.006 to 3503.050 reserved for expansion]

SUBCHAPTER B. PROMPT PAYMENT OF CONSTRUCTION PAYMENT BONDS

3503.051. Definitions.
3503.052. Construction of Subchapter.
3503.053. Certain Terms Void.
3503.054. Notice of Claim; Acknowledgment and Investigation.
3503.055. Notice of Acceptance or Rejection of Claim.
3503.056. Payment of Claim.

Section

3503.057. Rules.

[Sections 3503.058 to 3503.100 reserved for expansion]

SUBCHAPTER C. OTHER BONDS

3503.101. Bail bond Certificates

[Sections 3503.102 to 3503.150 reserved for expansion]

SUBCHAPTER D. SUIT ON CERTAIN BONDS OR OTHER OBLIGATIONS

3503.151. Venue of Suit on Certain Bonds or Other Obligations
3503.152. Residence of Insurance Company.
3503.153. Service of Process.
3503.154. Acceptance of Subchapter.

[Sections 3503.155 to 3503.200 reserved for expansion]

SUBCHAPTER E. REGULATION OF SURETY COMPANY

3503.201. Merger or Consolidation of Certain Companies.

SUBCHAPTER A. CERTAIN REQUIRED OR PERMITTED OBLIGATIONS

§ 3503.001. Definition

In this subchapter, "obligation" means a bond, undertaking, recognizance, guaranty, or other obligation that is by law or by a charter, ordinance, or rule of a municipality, board, body, organization, court, or public officer required or permitted to be made, given, tendered, or filed to guarantee the performance of an act, duty, or obligation or the refraining from an act.

Added by Acts 2005, 79th Leg., ch. 727, § 3, eff. April 1, 2007.

§ 3503.002. Execution of Obligation by Surety Company

(a) A surety company authorized to engage in business in this state may execute an obligation.

(b) Except as provided by Section 3503.004 or 3503.005, the execution of an obligation by a surety company under Subsection (a) is in full compliance with each law, charter, ordinance, or rule that requires:

(1) the obligation to be executed by one or more sureties; or

(2) the executing sureties to possess any qualification, including the requirement that a surety be a resident, householder, or freeholder.

(c) Each municipality, board, body, organization, court, public officer, and head of department shall

accept and treat an obligation executed by a surety company under Subsection (a) as fully complying with each law, charter, ordinance, or rule described by Subsection (b).

Added by Acts 2005, 79th Leg., ch. 727, § 3, eff. April 1, 2007.

§ 3503.003. Designation of Agent by Corporate Surety Required

Notwithstanding Section 3503.002, in specifications by a municipality for work or supplies for which sealed bids are required, the municipality may require that a corporate surety tender designate, in a manner satisfactory to the municipality, an agent:

(1) who is a resident of the county in which the municipality is located; and

(2) to whom any required notices may be delivered and on whom process may be served in matters arising out of the suretyship.

Added by Acts 2005, 79th Leg., ch. 727, § 3, eff. April 1, 2007.

§ 3503.004. Written Certification of Reinsurance as Condition of Acceptance of Obligation

(a) If an obligation is in an amount that exceeds 10 percent of the surety company's capital and surplus, the municipality, board, body, organization, court, or public officer may require, as a condition of

accepting the obligation, written certification that the surety company has reinsured the portion of the risk that exceeds 10 percent of the surety company's capital and surplus with one or more reinsurers who are authorized, accredited, or trusted to engage in business in this state.

(b) The amount reinsured by a reinsurer under this section may not exceed 10 percent of the reinsurer's capital and surplus.

(c) On request, the department shall provide the amount of the allowed capital and surplus, as of the date of the last annual statutory financial statement, for a surety company or reinsurer authorized to engage in business in this state.

Added by Acts 2005, 79th Leg., ch. 727, § 3, eff. April 1, 2007.

§ 3503.005. Additional Requirements for Certain Bonds

(a) A bond that is made, given, tendered, or filed under Chapter 53, Property Code, or Chapter 2253, Government Code, may be executed only by a surety company that is authorized to write surety bonds in this state. If the amount of the bond exceeds $100,000, the surety company must also:

(1) hold a certificate of authority from the United States secretary of the treasury to qualify as a surety on obligations permitted or required under federal law; or

(2) have obtained reinsurance for any liability in excess of $100,000 from a reinsurer that:

(A) is an authorized reinsurer in this state; and

(B) holds a certificate of authority from the United States secretary of the treasury to qualify as a surety or reinsurer on obligations permitted or required under federal law.

(b) To determine whether the surety on the bond or the reinsurer holds a certificate of authority from the United States secretary of the treasury, a party may conclusively rely on the list published in the Federal Register by the United States Department of the Treasury, covering the date on which the bond was executed, of the companies holding certificates of authority as acceptable sureties on federal bonds and as acceptable reinsuring companies. A purchaser, insurer of title, or lender acquiring or insuring an interest in or title to real property may also conclusively rely on, and is protected by, a statement on a recorded bond or a sworn, recorded statement by the surety that refers to the specific recorded bond and states that, at the time the bond was executed, the surety complied with Subsection (a)(1) or (2).

Added by Acts 2005, 79th Leg., ch. 727, § 3, eff. April 1, 2007.

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PLAINTIFF'S APPENDIX/EXCERPT 7
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(b) No bail bond surety, agent of a corporate surety or employee of such a surety or agent may make, cause to be made or benefit from:

(1) unsolicited contact, whether by verbal contact (including in-person and by telephone), electronic, written or other means, to solicit any bond business relating to a specific individual with an outstanding arrest warrant that has not been executed, unless the bail bond surety or agent for a corporate surety has a currently in-force bail bond on the individual;

(2) unsolicited in-person or telephone contact to solicit any bond business relating to a specific individual within 24 hours after the execution of an arrest warrant on that individual or within 24 hours after a warrantless arrest of an individual; or

(3) unsolicited in-person or telephone contact to solicit any bond business that occurs between the hours of 9:00 p.m. and 9:00 a.m.